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All Malayan Estates Staff Union v Rajasegaran & Ors

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01–2 OF 2005 (W)
RICHARD MALANJUM CJ (SABAH & SARAWAK), ALAUDDIN AND AUGUSTINE PAUL FCJJ
6 SEPTEMBER 2006

C *Labour Law — Industrial Court — Appointment of Chairman — Seven-year period — Whether the period is a reference to his practice or experience — Whether respondent a qualified person within the meaning of Industrial Relations Act 1967 s 23A(1)*

D *Statutory Interpretation — Construction of statutes — Rules of construction — Where construction will lead to some absurdity or some repugnance or inconsistency with the rest of the statutory provision*

E *Statutory Interpretation — Interpretation Act — s 17A — Where language of a provision is plain and unambiguous — Whether to resort to s 17A*

F This action was commenced by the appellant in the high court challenging the appointment of the respondent as a chairman of the industrial court on the ground that he did not satisfy the requirements of s 23A(1) of the Industrial Relations Act 1967 ('s 23A(1)'). The first respondent ('the respondent') was admitted and enrolled as an advocate and solicitor of the High Court on 15 December 1995. He commenced legal practice on 1 April 1996 and ceased to do so on 23 January 2001. He was appointed as a chairman of the industrial court on 15 January 2004. Thus even though the respondent had been admitted and enrolled as an advocate and G solicitor for eight years and one month at the date of his appointment he was in practice for only four years nine months and 22 days at that time. The critical issue for consideration in this case is whether the relevant period necessary to satisfy the requirements of s 23A(1) is the eight years and one month during which the respondent had been admitted and enrolled as an advocate and solicitor or the four H years nine months and 22 days when he was in legal practice. The learned judicial commissioner ruled that the respondent was not a qualified person within the meaning of s 23A(1). The respondent's appeal to the court of appeal was allowed. The Appellant obtained leave to appeal on that critical issue.

I

Held, allowing the appeal:

(1) The choice prescribed in s 17A of the Interpretation Act 1967 ('section 17A') ' … a construction that would promote the purpose or object underlying the Act … shall be preferred to a construction that would not promote that

purpose or object …' can only arise when the meaning of a statutory provision is not plain and is ambiguous. If, therefore, the language of a provision is plain and unambiguous s 17A will have no application as the question of another meaning will not arise. Thus it is only when a provision is capable of bearing two or more different meanings can s 17A be resorted to in order to determine the one that will promote the purpose or object of the provision. Such an exercise must be undertaken without doing any violence to the plain meaning of the provision. This is a legislative recognition of the purposive approach and is in line with the current trend in statutory interpretation (see para 12).

(2) The meaning accorded to the term 'advocate and solicitor' in s 23A(1) by the court of appeal brings to the forefront certain aspects of the section for consideration. The words 'has been' in s 23A(1), that is to say, ' … he has been an advocate and solicitor … ', means, on the authority of *Mubarak Mazdoor v KK Banerji* AIR 1958 Al 323, that he has at sometime been an advocate and solicitor and that it is not necessary for him to be one at the time of the appointment. This means that a person who has been admitted and enrolled as an advocate and solicitor for a period of seven years in the past is now qualified in law to be a chairman of the industrial court even if he had since ceased to be one. That would include a person who has been struck off the roll. Such a recognition in law by construing s 23A(1) in the way as done by the court of appeal will have just that effect resulting in absurd consequences. It is a settled rule of interpretation that if a construction will lead to some absurdity or some repugnance or inconsistency with the rest of the statutory provision, it may be departed from so as to avoid that absurdity or inconsistency (see para 14); *Grey v Pearson* (1857) 6 HLC 61.

(3) The Court of Appeal has construed the term 'advocate and solicitor' in s 23A(1) without any consideration of the significance of the seven-year period stipulated therein. The construction of s 23A(1) by the court of appeal can only mean that the seven-year gap between the time a person is admitted and enrolled as an advocate and solicitor and the time he is appointed as a chairman of the industrial court has no purpose. The legislature is deemed not to waste its words or to say anything in vain (see *Quebec Railway, Light, Heat and Power Co Ltd v Vandry* AIR 1920 PC 181). In this case, the seven-year period in s 23A(1) is closely connected to the qualification of a person as an advocate and solicitor. Therefore it ought to have been given due weight in order to determine its purpose instead of brushing it aside as mere surplusage (see para 14).

(4) The purpose of the seven-year period in relation to a member of the judicial and legal service can be used to determine the purpose of the same period in the case of an advocate and solicitor. There can be no dispute that the reference to a member of the judicial and legal service is a reference to a person who has been employed as a legal officer. The seven-year period in relation to such an officer is therefore a reference to his working experience in that capacity for the prescribed number of years. Similarly the need for a person to have been an advocate and solicitor for seven years preceding his appointment is obviously a reference to his practice or experience as such. The rationale underlying the

A equation of the seven-year requirement for an advocate and solicitor with a member of the judicial and legal service would promote and not frustrate the intention of Parliament (see para 15).

(5) A person who is entitled to practise as an advocate and solicitor under the Legal Profession Act 1976 is one with a practising certificate. Accordingly, the term B 'advocate and solicitor' in s 23A(1) must be construed as a reference to an advocate and solicitor who has been in practice under the Legal Profession Act 1976. This interpretation does not do any violence to the language employed in s 23A(1) and is consistent with the object of the section. It must thus be preferred in accordance with the requirement of s 17A (see para 21).

C (6) Even though the appointment of the respondent is invalid the awards handed down by him were done so in his capacity as a chairman of the industrial court and are not a nullity on grounds of public policy. They remain valid. This rule of public policy is encapsulated in section 41(a) of the Interpretation Act 1967 which provides that the proceedings of a board, commission, committee or D similar body established by law shall not be invalidated by any defect afterwards discovered in the appointment or qualification of a person purporting to be a member (see para 23).

[Bahasa Malaysia summary

E Tindakan ini dimulakan oleh perayu di mahkamah tinggi mencabar pelantikan responden sebagai pengerusi mahkamah perusahaan atas alasan beliau tidak memenuhi keperluan-keperluan s 23A(1) Akta Perhubungan Perusahaan 1967 ('s 23A(1)'). Responden pertama ('responden tersebut') dimasukkan dan didaftarkan seorang peguambela dan peguamcara mahkamah tinggi pada 15 Disember 1995. F Beliau telah memulakan amalan guamannya pada 1 April 1996 dan berhenti pada 23 Januari 2001. Beliau telah dilantik sebagai pengerusi Mahkamah Perusahaan pada 15 Januari 2004. Dengan itu walaupun responden telah dimasukkan dan didaftarkan sebagai peguambela dan peguamcara untuk lapan tahun, satu bulan dari tarikh pelantikannya beliau hanya beramal untuk empat tahun sembilan bulan dan 22 hari sahaja pada masa tersebut. Isu yang penting untuk ditentukan di dalam kes ini ialah G sama ada tempoh yang relevan yang dikehendaki untuk memenuhi keperluan-keperluan s 23A(1) ialah lapan tahun satu bulan di mana responden telah dimasukkan dan didaftarkan sebagai peguambela dan peguamcara ataupun empat tahun sembilan bulan dan 22 hari ketika beliau beramalan guaman. Pesuruhjaya kehakiman yang bijaksana telah memutuskan bahawa responden bukannya seorang H yang berkelayakan bagi maksud s 23A(1). Rayuan responden ke mahkamah rayuan dibenarkan. Perayu memperoleh kebenaran untuk merayu atas isu yang penting ini.

Diputuskan, membenarkan rayuan tersebut:

I (1) Pilihan yang dinyatakan dalam s 17A Akta Tafsiran 1967 ('s 17A') '… a construction that would promote the purpose or object underlying the Act … shall be preferred to a construction that would not promote that purpose or object …' hanya boleh dibangkitkan apabila maksud sesuatu peruntukan undang-undang tidak nyata dan tidak jelas. Jika, sekiranya, bahasa

peruntukan itu adalah nyata dan jelas, s 17A tidak terpakai oleh kerana soal maksud yang lagi satu tidak akan berbangkit. Dengan itu, hanya bila sesuatu peruntukan dapat membawa dua atau lebih maksud s 17A dapat dirujuk kepada untuk menentukan yang mana yang dapat memajukan tujuan atau matlamat peruntukan tersebut. Ini mesti dilakukan tanpa sebarang kekasaran terhadap maksud yang jelas peruntukan tersebut. Ini merupakan pengiktirafan undang-undang terhadap pendekatan 'purposive' dan mengikut aliran masa kini terhadap tafsiran undang-undang (lihat perenggan 12).

(2) Maksud yang diberikan kepada ayat 'advocate and solicitor' dalam s 23A(1) oleh mahkamah rayuan memerlukan pertimbangan beberapa aspek seksyen tersebut. Perkataan-perkataan 'has been' dalam s 23A(1), iaitu ' … he has been an advocate and solicitor … ', bermaksud, atas autoriti *Mubarak Mazdoor v KK Banerji* AIR 1958 Al 323, beliau telah pernah pada suatu ketika seorang peguambela dan peguamcara dan tidak perlu untuknya dijadikan seorang peguambela dan peguamcara pada masa beliau dilantik. Ini bermaksud seseorang yang telah dimasukkan dan didaftarkan sebagai peguambela dan peguamcara untuk jangka masa tujuh tahun pada masa lampau adalah pada masa kini layak di undang-undang untuk menjadi seorang pengerusi mahkamah perusahaan walaupun beliau telah berhenti daripada menjadi seorang peguambela dan peguamcara. Ini akan termasuk orang yang telah dibuang dari daftar. Pengiktirafan undang-undang sebegini dalam mentafsirkan s 23A(1) seperti yang dilakukan oleh mahkamah rayuan akan mempunyai efek yang akan menyebabkan akibat yang tidak munasabah. Ia adalah satu peraturan tafsiran yang mantap bahawa jika tafsiran akan mengakibatkan tafisran yang tidak munasabah atau meluat atau tidak konsisten dengan peruntukan-peruntukan perundangan yang lain, ia boleh menyimpang daripadanya untuk mengelakkan ia daripada tidak munasabah dan tidak konsisten (lihat perenggan 14); *Grey v Pearson* (1857) 6 HLC 61 dirujuk.

(3) Mahkamah Rayuan telah mentafsirkan istilah 'advocate and solicitor' di s 23A(1) tanpa memberi perhatian kepada pentingnya jangka masa tujuh tahun yang dinyatakan di situ. Tafsiran s 23A(1) oleh mahkamah rayuan hanya boleh bermaksud tujuh tahun lompang di antara masa seseorang dimasukkan dan didaftarkan sebagai peguambela dan peguamcara dan masa apabila ia dilantik sebagai pengerusi Mahkamah Perusahaan tidak mempunyai sebarang maksud. Badan perundangan dianggap tidak membazir perkataan-perkataannya atau menyatakan sesuatu tanpa sebab (lihat *Quebec Railway, Light, Heat and Power Co Ltd v Vandry* AIR 1920 PC 181). Dalam kes ini, jangkamasa tujuh tahun di s 23A(1) adalah berkait rapat dengan kelayakan seseorang sebagai peguambela dan peguamcara. Dengan itu ia harus diberikan pertimbangan sewajarnya untuk memastikan tujuannya dan bukannya ditolak ke tepi sebagai lebihan (lihat perenggan 14).

(4) Tujuan jangka masa tujuh tahun berhubungan dengan ahli perkhidmatan kehakiman dan perundangan boleh digunakan untuk memastikan tujuan jangka masa yang sama untuk peguambela dan peguamcara. Adalah tidak dipertikaikan bahawa rujukan kepada ahli perkhidmatan kehakiman dan perundangan adalah rujukan kepada seseorang yang diambil bekerja sebagai

pegawai undang-undang. Jangka masa tujuh tahun tersebut berhubungan dengan pegawai ini dengan itu merujuk kepada pengalaman pekerjaannya dalam tugas tersebut untuk tahun-tahun yang dinyatakan itu. Begitu juga keperluan untuk seseorang dijadikan sebagai peguambela dan peguamcara untuk tujuh tahun sebelum pelantikannya adalah dengan jelas merujuk kepada amalannya atau pengalamannya tersebut. Rasional yang menyamakan keperluan tujuh tahun untuk seseorang peguambela dan peguamcara dengan ahli perkhidmatan kehakiman dan perundangan akan mempromosikan dan bukannya memusnahkan matlamat Parlimen (lihat perenggan 15).

(5) Seseorang yang berhak beramal sebagai seorang peguambela dan peguamcara di bawah Akta Profesyen Undang-Undang 1976 adalah seorang yang mempunyai sijil amalan. Berikutan itu, istilah 'advocate and solicitor' di s 23A(1) harus ditafsirkan sebagai satu rujukan kepada peguambela dan peguamcara yang telah beramal di bawah Akta Profesyen Undang-Undang 1976. Tafsiran ini tidak memperkasarkan bahasa yang digunakan di s 23A(1) dan konsisten dengan matlamat seksyen tersebut. Dengan itu ia harus dipilih mengikut keperluan s 17A (lihat perenggan 21).

(6) Walaupun pelantikan responden adalah tidak sah, award-award yang diberikannya telah diberikan di dalam kapasiti sebagai pengerusi mahkamah perusahaan dan bukanlah terbatal atas alasan polisi awam. Mereka akan terus sah. Peraturan polisi awam ini terkandung di dalam s 41 Akta Tafsiran 1967 yang menyatakan bahawa sebarang prosiding lembaga, komisen, jawatankuasa atau badan jika kuasa diberi tidak akan ditaksahkan oleh sebarang kecacatan yang ditemui selepas dari itu dalam pelantikan atau kelayakan orang yang bertujuan untuk menjadi ahli (lihat perenggan 23).]

Notes

For cases on appointment of Chairman, Industrial Court generally, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1239–1410.

For cases on Interpretation Act generally, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1908-1919.

For cases on rules of construction, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1863–1878.

Cases referred to

Akberdin bin Hj Abdul Kader & Anor v Majlis Peguam Malaysia [2003] 1 MLJ 1 (refd)

Aswini Kumar Ghose v Arabinda Bose AIR 1952 SC 369 (refd)

Chief Adjudication Officer v Foster [1993] AC 754 (refd)

Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 346 (refd)

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114 (refd)

Gian Chand v Bahadur Singh AIR 1961 Punj 164 (refd)

Gokaraju Rangaraju v State of Andhra Pradesh AIR [1981] SC 1473 (refd)

Gokaraju Rangaraju v State of Andhra Pradesh AIR 1981 SC 1473 (refd)

Grey v Pearson (1857) 6 HLC 61 (refd)

James (An Insolvent), Re [1977] 2 WLR 1 (refd)

Kerajaan Malaysia v Yong Siew Choon [2006] 1 MLJ 1 (refd)

Kerajaan Malaysia v Yong Siew Choon [2006] 1 MLJ 1 (refd)
Metramac Corp Sdn Bhd v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113 (refd)
Mubarak Mazdoor v KK Banerji AIR 1958 Al 323 (refd)
Nadiad Borough Municipality v Nadiad Electric Co Ltd AIR 1964 Guj 30 (refd)
PP v Tan Tatt Eek & other appeals [2005] 2 MLJ 685 (refd)
Quebec Railway, Light, Heat and Power Co Ltd v Vandry AIR 1920 PC 181 (refd)
R (on the application of Quintavalle) v Secretary of State for Health [2003] 2 All ER 113 (refd)
Restick v Crickmor [1994] 1 WLR 420 (refd)
Robertson v Day [1879] 5 AC 63 (refd)
The King v Berchet [1688] 1 Show 106 (refd)
Western Coalfields Ltd v Chaturi Singh 1980 MPLJ 60 (DB) (refd)

Legislation referred to
Industrial Relations Act 1967 s 23A(1)
Interpretation Act 1967 ss 3, 17A, 41(a)
Legal Profession Act 1976 s 3

Appeal from: Civil Appeal No W–01–99 of 2004 (Court of Appeal, Putrajaya)

VK Raj (Ramdhari JBS and S Parimaladevi with him) (P Kuppusamy & Co) for the appellant.
Kamaludin Md Said (Narkunavathy Sundareson with him) (Attorney General's Chambers) for the respondents.
Anand Ponnudurai watching brief for Bar Council.

Augustine Paul FCJ (delivering judgment of the court):

[1] The first respondent ('the respondent') was admitted and enrolled as an Advocate and Solicitor of the High Court on 15 December 1995. He commenced legal practice on 1 April 1996 and ceased to do so on 23 January 2001. He was appointed as a Chairman of the Industrial Court on 15 January 2004. Thus even though the respondent had been admitted and enrolled as an advocate and solicitor for eight years and one month at the date of his appointment he was in practice for only four years nine months and 22 days at that time. The critical issue for consideration in this case is whether the relevant period necessary to satisfy the requirements of s 23A(1) of the Industrial Relations Act 1967 ('s 23A(1)') is the eight years and one month during which the respondent had been admitted and enrolled as an advocate and solicitor or the four years nine months and 22 days when he was in legal practice.

[2] This action was commenced by the appellant in the High Court challenging the appointment of the respondent as a Chairman of the Industrial Court on the ground that he did not satisfy the requirements of s 23A(1). The section reads as follows:

A person is qualified for appointment as President under section 21(1)(a) and as Chairman under section 23(2) if, for the seven years preceding his appointment, he has been an advocate and solicitor within the meaning of the Legal Profession Act 1976 or a member of the judicial and legal service of the Federation or of the legal service of a State, or sometimes one and sometimes another.

[3] Section 3 of the Legal Profession Act 1976 ('s 3') defines an 'Advocate and Solicitor' as:

In this Act unless the context otherwise requires —

'advocate and solicitor', and 'solicitor' where the context requires means an advocate and solicitor of the High Court admitted and enrolled under this Act or under any written law prior to the coming into operation of this Act;

[4] It was the contention of the appellant in the High Court that the period of seven years stipulated in s 23A(1) is a reference to being in practice and not merely being admitted and enrolled as an advocate and solicitor for the said period. Learned counsel referred to cases such as *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 346 and *Akberdin bin Hj Abdul Kader & Anor v Majlis Peguam Malaysia* [2003] 1 MLJ 1 and argued that the purposive method of interpretation should be adopted in interpreting s 23A(1). The learned senior federal counsel who appeared for the respondents contended that as the words of ss 3 and 23A(1) are clear and unambiguous it would be wrong in law to read into them a requirement for being in practice as what is stipulated is only for a person to have been admitted and enrolled as an advocate and solicitor for the required number of years.

[5] The learned judicial commissioner agreed with the appellant and ruled that the respondent was not a qualified person within the meaning of s 23A(1). As she said in her grounds of judgment:

Having considered both these submissions, I am inclined to agree with the applicant's submissions. As mentioned in the Court of Appeal decision of Akberdin Hj Abdul Kader, the modern approach to interpreting statutes is by adopting the purposive approach. I also agree that in adopting the approach, this Court is entitled to refer to Hansard as an aid to interpretation when there is some ambiguity in the words of a statute or where a literal interpretation would lead to an absurdity. I believe that taking a literal approach to the provision in question would lead to an absurdity. The then Deputy Minister of Labour Dato' Wan Abu Bakar bin Wan Mohamad had this to say when addressing the President of the Senate during the introduction of Act A 781:

Tuan Yang Di Pertua, perbicaraan di Mahkamah Perusahaan masa kini semakin menjadi lebih legalistic, dengan izin. Oleh itu, adalah dicadangkan Presiden dan semua Pengerusi Mahkamah Perusahaan hendaklah berkelulusan undang-undang dan berpengalaman sekurang-kurangnya 7 tahun sebagai peguambela dan peguamcara atau telah berkhidmat selama 7 tahun dalam Perkhidmatan Perundangan dan Kehakiman ataupun di dalam keduanya perkhidmatan sekali. Pindaan ini adalah dicadangkan dalam Fasal 12.

Therefore clearly in introducing the provision in question, Parliament had in mind that the Chairman of the Industrial Court should not only be legally qualified but possess some legal experience. Just because an advocate and solicitor is admitted to the Roll of advocates and

solicitors, it does not necessarily mean that he will as a matter of course acquire legal experience. What the Senior Federal Counsel appears to have overlooked is unlike a person who was a member of the judicial and legal service of the Federation or a member of the legal service of a State for at least 7 years, a person can be an 'advocate and solicitor' by definition and not be in practice at all. If the person were in one of the former positions, he would undoubtedly possess legal experience after at least 7 years in practice.

[6] The respondent appealed to the Court of Appeal. The appeal was allowed. The appellant obtained leave of this Court to appeal on the following issue:

Whether an Advocate and Solicitor within the meaning of the Legal Profession Act 1976 who has not been practising for the 7 years preceding his appointment is qualified to be appointed as Chairman of the Industrial Court under section 23A Industrial Relations Act 1967.

[7] In his submission before us, learned counsel for the appellant contended that the crux of the matter is the meaning to be ascribed to the term 'advocate and solicitor' in s 23A(1). He said that as s 23A(1) refers to an advocate and solicitor 'within the meaning of the Legal Profession Act 1976' a determination of the meaning of the term as used in the whole of the Legal Profession Act 1976 is required and not merely s 3. He then referred to various sections of the Act where the term has been used in different senses. Thus, he said, the proper meaning of the term must be its definition provided in s 3 of the Interpretation Act 1967. Accordingly, in order for a person to be qualified to be a Chairman of the Industrial Court he must have been an advocate and solicitor with a valid practising certificate for the seven years preceding his appointment. He then submitted, in the alternative, that the definition of an advocate and solicitor in s 3 must be subject to the context in which it is used. He added that the various senses in which the term advocate and solicitor has been used in the Act coupled with its definition in s 3 of the Interpretation Act 1967 can only mean that its meaning in s 23A(1) is either too general or ambiguous. Therefore, he said, the term must be subject to a purposive interpretation pursuant to s 17A of the Interpretation Act 1967 ('s 17A'). In ascertaining the object of s 23A(1) he relied on the speech of the Deputy Minister of Labour in the Hansard who said that '… semua Pengerusi Mahkamah Perusahan hendaklah berkelulusan undang-undang dan berpengalaman sekurang-kurangnya tujuh tahun sebagai peguambela dan peguamcara … '. This means, he said, s 23A(1) refers to an advocate and solicitor who has been engaged in actual practice. In concluding his submission learned counsel referred to several text books and cases such as *Re James (An Insolvent)* [1977] 2 WLR 1 and *Gokaraju Rangaraju v State of Andhra Pradesh* AIR 1981 SC 1473 to support his view that the validity of awards made by the respondent will not be affected if his appointment is now declared to be null and void.

[8] In his reply, the learned senior federal counsel referred to the definition of the term advocate and solicitor in s 3 and said that it does not refer to the active practice of a person. He referred to *Kerajaan Malaysia v Yong Siew Choon* [2006] 1 MLJ 1 where it was held that if a word used in a statute is clear and unambiguous the definition provided for it cannot be amended or corrected in order to change the meaning of the word. In further support, he relied on *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114 where it

was held that words cannot be added to a legislation when it was not intended. He said that the object of s 23A(1) is to provide for the qualification of a Chairman of the Industrial Court and it must be so construed in accordance with s 17A. Thus the term 'active practice' cannot be read into the precise, clear and unambiguous meaning of s 23A(1). He then referred to *PP v Tan Tatt Eek & other appeals* [2005] 2 MLJ 685 where it was held that when the words of a statute are clear, plain and unambiguous, that is to say, they are reasonably susceptible to only one meaning, the courts are bound to give effect to that meaning irrespective of the consequences. Accordingly, he said, the Court of Appeal was correct in adopting the literal interpretation to give effect to the words in s 23A(1).

[9] The central theme of the submission of both parties is the correct meaning to be accorded to the term 'advocate and solicitor' in s 23A(1). As the answer to the problem posed involves a question of statutory interpretation what is of immediate concern is the nature and effect of s 17A. It reads as follows:

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[10] In order to appreciate the scope of s 17A it is perhaps useful to refer to the judgment of the House of Lords in *R (on the application of Quintavalle) v Secretary of State for Health* [2003] 2 All ER 113 where Lord Bingham said at pp 118–119:

> Such is the skill of Parliamentary draftsmen that most statutory enactments are expressed in language which is clear and unambiguous and gives rise to no serious controversy. But these are not the provisions which reach the courts, or at any rate the appellate courts. Where parties expend substantial resources arguing about the effect of a statutory provision it is usually because the provision is, or is said to be, capable of bearing two or more different meanings, or to be of doubtful application to the particular case which has now arisen, perhaps because the statutory language is said to be inapt to apply to it, sometimes because the situation which has arisen is one which the draftsman could not have foreseen and for which he has accordingly made no express provision.
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> The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsmen will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.
>
> There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking.

If Parliament, however long ago, passed an Act applicable to dogs, it could not properly be interpreted to apply to cats; but it could properly be held to apply to animals which were not regarded as dogs when the Act was passed but are so regarded now. The meaning of 'cruel and unusual punishments' has not changed over the years since 1689, but many punishments which were not then thought to fall within that category would now be held to do so. The courts have frequently had to grapple with the question whether a modern invention or activity falls within old statutory language: see Bennion Statutory Interpretation (4th edn, 2002) Pt XVIII, s 288. A revealing example is found in *Grant v Southwestern and County Properties Ltd* (1974) 2 All ER 465, (1975) Ch 185 where Walton J had to decide whether a tape recording fell within the expression 'document' in the Rules of the Supreme Court. Pointing out (1974) 2 All ER 465 at 469, (1975) Ch 185 at 190) that the furnishing of information had been treated as one of the main functions of a document, the judge concluded that the tape recording was a document.

Limited help is in my opinion to be derived from statements made in cases where there is said to be an omission in a statute attributable to the oversight or inadvertence of the draftsman: see *Jones v Wrotham Park Settled Estates* [1979] 1 All ER 286 at p 289; [1980] AC 74 at p 105; *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 2 All ER 109; [2000] 1 WLR 586. This is not such a case. More pertinent is the guidance given by the late Lord Wilberforce in his dissenting opinion in Royal College of Nursing of the *UK v Department of Health and Social Security* [1981] 1 All ER 545; [1981] AC 800. The case concerned the Abortion Act 1967 and the issue which divided the House was whether nurses could lawfully take part in a termination procedure not known when the Act was passed. Lord Wilberforce said:

> In interpreting an Act of Parliament it is proper, and indeed necessary, to have regard to the state of affairs existing, and known by Parliament to be existing, at the time. It is a fair presumption that Parliament's policy or intention is directed to that state of affairs. Leaving aside cases of omission by inadvertence, this being not such a case when a new state of affairs, or a fresh set of facts bearing on policy, comes into existence, the courts have to consider whether they fall within the parliamentary intention. They may be held to do so if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made. How liberally these principles may be applied must depend on the nature of the enactment, and the strictness or otherwise of the words in which it has been expressed. The courts should be less willing to extend expressed meanings if it is clear that the Act in question was designed to be restrictive or circumscribed in its operation rather than liberal or permissive. They will be much less willing to do so where the new subject matter is different in kind or dimension from that for which the legislation was passed. In any event there is one course which the courts cannot take under the law of this country: they cannot fill gaps; they cannot by asking the question. 'What would Parliament have done in this current case, not being one in contemplation, if the facts had been before it?', attempt themselves to supply the answer, if the answer is not to be found in the terms of the Act itself.' (See [1981] 1 All ER 545 at pp 56–565, [1981] AC 800 at 822.)

Both parties relied on this passage, which may now be treated as authoritative.

Lord Steyn said at pp 122–123:

> In reaching a conclusion that cell nuclear replacement is a process covered by s 1(1) of the 1990 Act the Court of Appeal ([2002] 2 All ER 625 at (27)) adopted a purposive approach. The extensive interpretation adopted by the Court of Appeal could only be justified by a purposive approach. It was a necessary step in the reasoning of the Court of Appeal but not a sufficient one. The Court of Appeal found the basis for such an approach in the fact that

A the Human Rights Act 1998 extended 'the boundaries of purposive interpretation … where needs must'. Given that the 1998 Act is not applicable in the present case I would accept the submission of counsel for the appellant that this approach is not appropriate. On the other hand, the adoption of a purposive approach to construction of statutes generally, and the 1990 Act in particular, is amply justified on wider grounds. In *Cabell v Markham* (1945) 148 F 2d 737 at p 739, learned Hand J explained the merits of purposive interpretation:

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> Of course, it is true that words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and
C imaginative discovery is the surest guide to their meaning.

The pendulum has swung towards purposive methods of construction. This change was not initiated by the teleological approach of European Community jurisprudence, and the influence of European legal culture generally, but it has been accelerated by European ideas: see, however, a classic early statement of the purposive approach by Lord Blackburn in *River*
D *Wear Comrs v Adamson* (1877) 2 App Cas 743 at p 763; (1874 - 80) All ER Rep 1 at p 11. In any event, nowadays the shift towards purposive interpretation is not in doubt. The qualification is that the degree of liberality permitted is influenced by the context, eg social welfare legislation and tax statutes may have to be approached somewhat differently.

E **[11]** In summarising the principles governing the application of the purposive approach to interpretation, *Craies on Legislation* (8th Ed) says at p 566:

(1) Legislation is always to be understood first in accordance with its plain meaning.

F (2) Where the plain meaning is in doubt, the courts will start the process of construction by attempting to discover, from the provisions enacted, the broad purpose of the legislation.

(3) Where a particular reading would advance the purpose identified, and would do no violence to the plain meaning of the provisions enacted, the courts will be prepared to adopt that reading.

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(4) Where a particular reading would advance the purpose identified but would strain the plain meaning of the provisions enacted, the result will depend on the context and, in particular, on a balance of the clarity of the purpose identified and the degree of strain on the language.

H (5) Where the courts conclude that the underlying purpose of the legislation is insufficiently plain, or cannot be advanced without any unacceptable degree of violence to the language used, they will be obliged, however regretfully in the circumstances of a particular case, to leave to the legislature the task of extending or modifying the legislation.

I **[12]** The choice prescribed in s 17A of ' … a construction that would promote the purpose or object underlying the Act … shall be preferred to a construction that would not promote that purpose or object …' can only arise when the meaning of a statutory provision is not plain and is ambiguous. If, therefore, the language of a provision is plain and unambiguous s 17A will have no application as the question

of another meaning will not arise. Thus, it is only when a provision is capable of bearing two or more different meanings can s 17A be resorted to in order to determine the one that will promote the purpose or object of the provision. Such an exercise must be undertaken without doing any violence to the plain meaning of the provision. This is a legislative recognition of the purposive approach and is in line with the current trend in statutory interpretation. The principles set out in the preceding paragraphs will therefore be relevant to the operation of s 17A.

[13] It is now apposite to consider the meaning of s 23A(1) read with s 3. The Court of Appeal was of the view that the term 'advocate and solicitor' in s 23A(1) means an advocate and solicitor of the High Court admitted and enrolled under the Legal Profession Act 1976 as defined in s 3. In writing for the court, Nik Hashim JCA (as he then was) said:

> In our judgment the qualification for the appointment as Chairman of the Industrial Court is clearly stated in s 23A(1) of the Act. There is nothing in either the provisions of s 23A(1) specifically or in Act 166 generally, which explicitly stipulate that the candidate to have been in 'active practice' before he could be appointed as Chairman. The statutory definition of 'advocate and solicitor' as required by s 23A(1) is contained in section 3 of Act 166 which defines the phrase to mean an advocate and solicitor of the High Court admitted and enrolled under Act 166 or under any written law prior to the coming into operation of Act 166. These two provisions have to be read in tandem, for the reference in s 23A(1) to 'an advocate and solicitor within the meaning of the Legal Profession Act 1976 (Act 166)' clearly refers to the statutory definition contained in section 3 of Act 166.
>
> Thus, we agree with the learned Senior Federal Counsel that the learned JC erred in opting to give a wider interpretation to s 23A(1) by requiring an advocate and solicitor to maintain a practising certificate for 7 years to qualify for appointment as Chairman. This interpretation of s 23A(1) clearly exceeds the definition intended by Parliament to the phrase 'advocate and solicitor' in section 3 of Act 166.
>
> .....
>
> In the present case, s 23A(1) of the Act read together with section 3 of Act 166 are clear and unambiguous in their terms. Thus, when she adopted the purposive approach in interpreting the provisions by adding words which were not intended, the learned JC was employing a construction that produces an unjust result and therefore such an approach does not promote the purpose or object underlying the Act. Purposive approach in the interpretation of a statute as required under s 17A of Act 388 does not mean that literal approach in the interpretation should be disregarded. A construction be it purposive or literal, that would promote the purpose or object underlying a statute that matters to the court in the interpretation of a statute.
>
> It must be noted that s 23A(1) of the Act was enacted especially for a specific purpose that is to provide for the qualification of President and Chairman of the Industrial Court. Such being the case, the learned JC had no choice but to give effect to the plain meaning of the words used in the provisions rather than inventing ambiguities in them. The Federal Court in*Malaysian Bar v Dato' Kanagalingam Velupillai* [2004] 4 CLJ 194 at p 200 agreed with the observation made by Lord Diplock in *Dupont Steels Ltd & Ors v Sirs & Ors* [1980] 1 WLR 142 at p 157:
>
> > Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to the plain meaning …

Since the provisions of s 23A(1) of the Act are precise and unambiguous, it is therefore superfluous for the learned JC to resort to the introduction speech of the Deputy Minister of Human Resources in moving the Bill of Act 166 as the words of the Deputy Minister cannot be determinative of the provisions in the section since the speech is only available as an aid to interpretation. Edgar Joseph Jr FCJ in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345at p 360 cautioned:

> We hasten to add, however, that when resort to Hansard is permissible, that by itself although meriting serious consideration cannot be determinative of the issue since it *is only available as an aid to interpretation. To hold otherwise, would amount to substituting the words of the Minister or other promoter of the Bill for the words of the statute, and that cannot be the law.*

Obviously, in reaching her decision, the learned JC failed to take into consideration the clear words employed by the draftsman in s 23A(1) of the Act. If indeed it was Parliament's intention for only legally qualified appointees who have maintained a practising certificate for at least 7 years to qualify for appointment as Chairman, as understood by the learned JC, the draftsman would have surely employed different words in crafting the section.

(Emphasis added.)

[14] The meaning accorded to the term 'advocate and solicitor' in s 23A(1) by the Court of Appeal brings to the forefront certain aspects of the section for consideration. Firstly, the words 'has been' in s 23A(1), that is to say, ' … he has been an advocate and solicitor … ', means, on the authority of *Mubarak Mazdoor v KK Banerji* AIR 1958 Al 323, that he has at sometime been an advocate and solicitor and that it is not necessary for him to be one at the time of the appointment. This means that a person who has been admitted and enrolled as an advocate and solicitor for a period of seven years in the past is now qualified in law to be a Chairman of the Industrial Court even if he had since ceased to be one. That would include a person who has been struck off the roll. Can it be the intention of s 23A(1) to recognise the appointment of a person who has ceased to be on the roll of advocates and solicitors by being struck off? Such a recognition in law by construing s 23A(1) in the way as done by the Court of Appeal will have just that effect resulting in absurd consequences. It is a settled rule of interpretation that if a construction will lead to some absurdity or some repugnance or inconsistency with the rest of the statutory provision, it may be departed from so as to avoid that absurdity or inconsistency (see *Grey v Pearson* (1857) 6 HLC 61). Secondly, the Court of Appeal has construed the term 'advocate and solicitor' in s 23A(1) without any consideration of the significance of the seven-year period stipulated therein. The construction of s 23A(1) by the Court of Appeal can only mean that the seven-year gap between the time a person is admitted and enrolled as an advocate and solicitor and the time he is appointed as a Chairman of the Industrial Court has no purpose. The legislature is deemed not to waste its words or to say anything in vain (see *Quebec Railway, Light, Heat and Power Co Ltd v Vandry* AIR 1920 PC 181). In *The King v Berchet* (1688) 1 Show 106, it was held that it is a well-known rule in the interpretation of statutes that such a sense is to be made upon the whole so that no clause, sentence or word shall prove superfluous, void or insignificant if by any other construction they may all be made useful and pertinent. Thus, it is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute (see

Aswini Kumar Ghose v Arabinda Bose AIR 1952 SC 369). In this case, the seven-year period in s 23A(1) is closely connected to the qualification of a person as an advocate and solicitor. Therefore, it ought to have been given due weight in order to determine its purpose instead of brushing it aside as mere surplusage. What then is the significance of the seven-year period in relation to a person who has been admitted and enrolled as an advocate and solicitor? Under s 23A(1), the seven-year period applies both to an advocate and solicitor as well as to a member of the judicial and legal service. It is a legitimate rule of construction to construe words in an Act of Parliament with reference to words found in immediate connection with them (see *Robertson v Day* (1879) 5 AC 63). The exact colour and shape of the meaning of any word in a statute is not to be ascertained by reading them in isolation but in the context of the other enacting parts of the statute (see *Western Coalfields Ltd v Chaturi Singh* 1980 MPLJ 60 (DB)). It has been held that words must be read structurally and in their context for their significance may vary with their contextual setting (see *Nadiad Borough Municipality v Nadiad Electric Co Ltd* AIR 1964 Guj 30). Useful reference may also be made

> It is a familiar rule in the construction of legal instruments, alike dictated by authority and common sense, that common words in a statute are to be extended to all the objects which, in their usual acceptation, they describe or denote, unless the context indicates that such a construction would frustrate the real intention of the draftsman.

[15] Thus, the purpose of the seven-year period in relation to a member of the judicial and legal service can be used to determine the purpose of the same period in the case of an advocate and solicitor. There can be no dispute that the reference to a member of the judicial and legal service is a reference to a person who has been employed as a legal officer. The seven-year period in relation to such an officer is therefore a reference to his working experience in that capacity for the prescribed number of years. Similarly, the need for a person to have been an advocate and solicitor for seven years preceding his appointment is obviously a reference to his practice or experience as such. The rationale underlying the equation of the seven-year requirement for an advocate and solicitor with a member of the judicial and legal service would promote and not frustrate the intention of Parliament. The conclusion is consistent with the speech from the *Hansard* of the Deputy Minister of Labour in the Senate where he said:

> Tuan Yang Di-Pertua, perbicaraan di Mahkamah Perusahaan masa kini semakin menjadi lebih legalistic, dengan izin. Oleh itu, adalah dicadangkan Presiden dan semua Pengerusi Mahkamah Perusahaan hendaklah berkelulusan undang-undang dan berpengalaman sekurang-kurangnya 7 tahun sebagai peguambela dan peguamcara atau telah berkhidmat tujuh tahun dalam Perkhidmatan Perundangan dan Kehakiman ataupun di dalam keduanya perkhidmatan sekali.

[16] It must be added, as observed by the learned judicial commissioner in her grounds of judgment, that a court is entitled to refer to the *Hansard* as an aid to interpretation when there is some ambiguity in the meaning of the words in a statute or when a literal interpretation of it would lead to an absurdity (see *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 346). It is therefore clear that the object of s 23A(1) in requiring a person to have been an advocate and solicitor for seven

years preceding his appointment is to ensure that he has experience as one during the period specified. It can now be discerned that the interpretation of s 23A(1) by the Court of Appeal is one that is ambiguous while the High Court had adopted the correct approach. The difference of judicial opinion on the construction of s 23A(1) in the Courts below is itself sufficient evidence of its ambiguity (see *Restick v Crickmore* [1994] 1 WLR 420; *Chief Adjudication Officer v Foster* [1993] AC 754). The term 'advocate and solicitor' must therefore be construed in accordance with the preference stipulated in s 17A.

[17] Be that as it may, such an approach will only be possible if the language of s 23A(1) read with s 3 permits it. As this Court observed in *Kerajaan Malaysia v Yong Siew Choon* [2006] 1 MLJ 1 at p 11:

> As the definition is clear and unambiguous it cannot be ignored. As Bindra's Interpretation of Statutes (7th Ed) says at p 39:
>
> > When a Legislature defines the language it uses, its definition is binding upon the Court and this is so even though the definition does not coincide with the ordinary meaning of the word used. It is not for the Court to ignore the statutory definition and proceed to try and extract the true meaning of the expression independently of it (*Nand Rao v Arunachalam* AIR 1940 Mad 385). If the Legislature's intention is clear and unambiguous, it is obviously outside the jurisdiction of the court to correct or amend the definition in the interpretation clause (*Mordhwaj Singh v State of UP* 24).

[18] Thus, where a particular word is defined in a statute which narrows and restricts its ordinary meaning the meaning given in the definition must be applied to the word wherever it appears in the statute, unless the contrary is clearly indicated (see *Gian Chand v Bahadur Singh* AIR 1961 Punj 164). In this case, such a contrary intention appears in section 3 itself which makes the definitions provided applicable ' … unless the context otherwise requires … '. Thus, where the definition provided is inconsistent with the language and context of a section then it will not apply to the interpretation of the section. In support reference is made to the judgment of this court in *Metramac Corp Sdn Bhd v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113 at pp 123–124:

> In determining the proper construction to be accorded to the word 'proceeding' in section 44(1) it must be observed that the meaning of a word given in an Act of Parliament cannot be blindly and slavishly applied each time it appears in the Act. This is made manifestly patent by section 3 itself which, like other definition provisions, makes the definitions provided applicable ' … … … unless the context otherwise requires … … … '. Thus as SK Das J said in *Ram Narain v State of UP* AIR 1957 SC 18 at p 23:
>
> > The meanings of words and expressions used in an Act must take their colour from the context in which they appear.
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> In *Laxmana Rao v China* AIR 1980 Andh Pra 191 it was held that the meaning given to a particular expression by the definition clause is always subject to the context. The context in which the word is used may therefore render the meaning prescribed inapplicable.

[19] This principle is re-emphasised in s 3 because not only does the enacting part of the section contain the words '… unless the context otherwise requires …' but also

the definition of 'advocate and solicitor' itself is made applicable only '… where the context requires …'. The language of section 3 in its definition of 'advocate and solicitor' is therefore flexible and only applies where the context requires it. It can be ignored to suit the context in which it is used.

[20] It is therefore permissible to construe the term 'advocate and solicitor' in s 23A(1) as a reference to one in practice, as discussed in an earlier part of the judgment, without being bound by s 3. This approach is also supported by s 3 of the Interpretation Act 1967 which defines an 'advocate', though not an 'advocate and solicitor', as:

> 'advocate' means a person entitled to practise as an advocate or as an advocate and solicitor under the law in force in any part of Malaysia.

[21] A person who is entitled to practise as an advocate and solicitor under the Legal Profession Act 1976 is one with a practising certificate. Accordingly, the term 'advocate and solicitor' in s 23A(1) must be construed as a reference to an advocate and solicitor who has been in practice under the Legal Profession Act 1976. This interpretation does not do any violence to the language employed in s 23A(1) and is consistent with the object of the section as discussed earlier. It must thus be preferred in accordance with the requirement of s 17A. The answer to the question posed for our determination would therefore be in the negative.

[22] Our conclusion raises the critical question of the validity of the awards handed down by the respondent while officiating as a Chairman of the Industrial Court. As far as the legality of his acts is concerned, it matters not how his appointment was made. It is sufficient if he is clothed with the insignia of the office and exercises its powers and functions. His official acts are recognised as valid on grounds of public policy and for the protection of those having official business to transact. In taking this stand learned counsel for the Appellant referred to the case of *Gokaraju Rangaraju v State of Andhra Pradesh* AIR 1981 SC 1473 where Chinnappa Reddy J in writing for the Supreme Court of India said at pp 1475–1478:

> We are unable to agree with the submissions of the learned counsel for the appellants. The doctrine is now well established that 'the acts of the Officers de facto performed by them within the scope of their assumed official authority, in the interest of the public or third persons and not for their own benefit, are generally as valid and binding, as if they were the acts of officers de jure' (*Pulin Behari v King Emperor* (1912) 15 Cal LJ 517 at p 574). As one of us had occasion to point out earlier 'the doctrine is founded on good sense, sound policy and practical experience. It is aimed at the prevention of public and private mischief and the protection of public and private interest. It avoids endless confusion and needless chaos. An illegal appointment may be set aside and a proper appointment may be made, but the acts of those who hold office de facto are not so easily undone and may have lasting repercussions and confusing sequels if attempted to be undone. Hence the de facto doctrine' (vide *Immedisetti Ramkrishnaiah Sons v State of Andhra Pradesh* AIR 1976 Andh Pra 193).
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> In *Pulin Behari v King Emperor*, Sri Asutosh Mookerjee J, noticed that in England the de facto doctrine was recognisd from the earliest times. The first of the reported cases where the doctrine received judicial recognition was the case of *Abbe of Fontaine* decided in 1431.

Sir Ashutosh Mookerjee noticed that even by 1431 the de facto doctrine appeared to be quite well known and, after 1431, the doctrine was again and again reiterated by English Judges.

In *Milward v Thatcher* (1787) 2 TR 81 at p 87, Buller J said:

> The question whether the judges below be properly judges or not, can never be determined, it is sufficient if they be judges de facto. Suppose a person were even criminally convicted in a Court of Record, and the Recorder of such Court were not duly elected, the conviction would still be good in law, he being the judge de facto.

In *Scadding v Lorant* (1851) 3 HLC 418, the question arose whether a rate for the relief of the poor was rendered invalid by the circumstance that some of the vestry men who made it were vestry men de facto and not de jure. The Lord Chancellor observed as follows:

> With regard to the competency of the vestry men, who were vestry men de facto, but not vestry men de jure, to make the rate, your Lordship will see at once the importance of that objection, when you consider how many public officers and persons there are who were charged with very important duties, and whose title to the office on the part of the public cannot be ascertained at the time. You will at once see to what it would lead if the validity of their acts, when in such office, depended upon the propriety of their election. It might tend, if doubts were cast upon them, to consequences of the most destructive kind. It would create uncertainty with respect to the obedience to public officers and it might also lead to persons, instead of resorting to ordinary legal remedies to set right anything done by the officers, taking the law into their own hands.

Some interesting observations were made by the Court of Appeal in England in *Re James (An Insolvent)* (1977) 2 WLR 1). Though the learned judges constituting the Court of Appeal differed on the principal question that arose before them namely whether 'the High Court of Rhodesia' was a British Court, there did not appear to be any difference of opinion on the question of the effect of the invalidity of the appointment of a judge on the judgments pronounced by him. Lord Denning MR, characteristically, said, 'He sits in the seat of a judge. He wears the robes of a judge. He holds the office of a judge. Maybe he was not validly appointed. But, still, he holds the office. It is the office that matters, not the incumbent … so long as the man holds the office and exercises it duly and in accordance with law, his orders are not a nullity. If they are erroneous they may be upset on appeal. But if not erroneous they should be upheld'. Lord Denning then proceeded to refer to the *State of Connecticut v Carroll* (1871–38 Conn 449) decided by the Supreme Court of Connecticut, *Re Aldridge* (1893 – 15 NZLR 316) decided by the Court of Appeal in New Zealand and *Norton v Shelby County* (1886 – 118 US 425) decided by the United States Supreme Court. Observations made in the last case were extracted and they were:

> Where an office exists under the law, it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions. … The official acts of such persons are recognised as valid on grounds of public policy, and for the protection of those having official business to transact.

Scarman LJ who differed from Lord Denning on the question whether the High Court of Rhodesia was a British Court appeared to approve the view of Lord Denning MR in regard to the de facto doctrine. He said:

> He (Lord Denning) invokes the doctrine of recognition of the de facto judge and the doctrine of implied mandate of necessity. I agree with much of the thinking that lies

behind his judgment. I do not think that in an appropriate case our courts will recognise the validity of judicial acts, even though they be the acts of a judge not lawfully appointed or derive their authority from an unlawful government. But it is a fallacy to conclude that, because in certain circumstances our Courts would recognise as valid the judicial acts of an unlawful Court or a de facto judge, therefore, the Court thus recognised is a British Court.

The de facto doctrine has received judicial recognition in the United States of America also. In *State v Gardner* (*Cases on Constitutional Law* by Mc Gonvey and Howard Third Edition 102) the question arose whether the offer of a bribe to a City Commissioner whose appointment was unconstitutional was an offence. Bradbury J said:

We think that principle of public policy, declared by the English Courts three centuries ago, which gave validity to the official acts of persons who intruded themselves into an office to which they had not been legally appointed, is as applicable to the conditions now presented as they were to the conditions that then confronted the English Judiciary. We are not required to find a name by which officers are to be known, who have acted under a statute that has subsequently been declared unconstitutional, though we think such officers might aptly be called de facto officers.

In *Norton v Shelby County* (1886) 118 US 425: 30 L ed 178 Field, J, observed as follows:

The doctrine which gives validity to acts of officers de facto whatever defects there may be in the legality of their appointment or election is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result, if in every proceeding before such officers their title could be called in question.

In Cooley's *Constitutional Limitation*', Eighth Edition, Volume II p 1355, it is said:

An officer de facto is one who by some colour or right is in possession of an office and for the time being performs its duties with public acquiescence, though having no right in fact. His colour of right may come from an election or appointment made by some officer or body having colourable but no actual right to make it; or made in such disregard of legal requirements as to be ineffectual in law; or made to fill the place of an officer illegally removed or made in favour of a party not having the legal qualifications; or it may come from public acquiescence in the qualifications; or it may come from public acquiescence in the officer holding without performing the precedent conditions, or holding over under claim of right after his legal right has been terminated; or possibly from public acquiescence alone when accompanied by such circumstances of official reputation as are calculated to induce people, without inquiry, to submit to or invoke official action on the supposition that the person claiming the office is what he assumes to be. An intruder is one who attempts to perform the duties of an office without authority of law, and without the support of public acquiescence.

No one is under obligation to recognise or respect the acts of an intruder, and for all legal purposes they are absolutely void. But for the sake of order and regularity, and to prevent confusion in the conduct of public business and in security of private rights, the acts of officers de facto are not suffered to be questioned because of the want of legal authority

except by some direct proceeding instituted for the purpose by the State or by some one claiming the office de jure, or except when the person himself attempts to build up some right, or claim some privilege or emolument, by reason of being the officer which he claims to be. In all other cases the acts of an officer de facto are as valid and effectual, while he is suffered to retain the office as though he were an officer by right, and the same legal consequences will flow from them for the protection of the public and of third parties. There is an important principle, which finds concise expression in the legal maxim that the acts of officers de facto cannot be questioned collaterally.

In *Black* on judgments it is said:

A person may be entitled to his designation although he is not a true and rightful incumbent of the office, yet he is no mere usurper but holds it under colour of lawful authority. And there can be no question that judgments rendered and other acts performed by such a person who is ineligible to a judgeship but who has nevertheless been duly appointed, and who exercises the power and duties of the office is a de facto judge, and his acts are valid until he is properly removed.

The de facto doctrine has been recognised by Indian Courts also. In *Pulin Behari v King Emperor* (1912 – 15 Cal LJ 517) Sir Asutosh Mukerjee J after tracing the history of the doctrine in England observed as follows:

The substance of the matter is that the de facto doctrine was introduced into the law as a matter of policy and necessity, to protect the interest of the public and the individual where these interests were involved in the official acts of persons exercising the duties of an office without being lawful officers. The doctrine in fact is necessary to maintain the supremacy of the law and to preserve peace and order in the community at large. Indeed, if any individual or body of individuals were permitted, at his or their pleasure, to collaterally challenge the authority of and to refuse obedience to the Government of the State and the numerous functionaries through whom it exercised its various powers on the ground of irregular existence or defective title, insubordination and disorder of the worst kind would be encouraged. For the good order and peace of society, their authority must be upheld until in some regular mode their title is directly investigated and determined.

In *PS Menon v State of Kerala* (AIR 1970 Ker 165 at p 170) a Full Bench of the Kerala High Court consisting of P Govindan Nair, KK Mathew and TS Krishnamoorthy Iyer JJ said about the de facto doctrine:

This doctrine was engrafted as a matter of policy and necessity to protect the interest of the public and individuals involved in the official acts of persons exercising the duty of an officer without actually being one in strict point of law. But although these officers are not officers de jure they are by virtue of the particular circumstances, officers, in fact, whose acts, public policy requires should be considered valid.

In the judgment under appeal, Kuppuswami and Muktadar JJ observed:

Logically speaking if a person who has no authority to do so functions as a Judge and disposes of a case the judgment rendered by him ought to be considered as void and illegal, but in view of the considerable inconvenience which would be caused to the public in holding as void judgments rendered by judges and other public officers whose title to the office may be found to be defective at a later date, Courts in a number of countries have, from ancient times evolved a principle of law that under certain conditions, the acts of a Judge or officer not legally competent may acquire validity.

A Judge, de facto, therefore, is one who is not a mere intruder or usurper but one who holds office, under colour of lawful authority, though his appointment is defective and may later be found to be defective. Whatever be the defect of his title to the office, judgments pronounced by him and acts done by him when he was clothed with the powers and functions of the office, albeit unlawfully, have the same efficacy as judgments pronounced and acts done by a Judge de jure. Such is the de facto doctrine, born of necessity and public policy to prevent needless confusion and endless mischief. There is yet another rule also based on public policy. The defective appointment of a de facto judge may be questioned directly in a proceeding to which he may be a party but it cannot be permitted to be questioned in a litigation between two private litigants, a litigation which is of no concern or consequence to the judge except as a judge. Two litigants litigating their private titles cannot be permitted to bring in issue and litigate upon the title of a judge to his office. Otherwise so soon as a judge pronounces a judgment a litigation may be commenced for a declaration that the judgment is void because the judge is no judge. A judge's title to his office cannot be brought into jeopardy in that fashion. Hence the rule against collateral attack on validity of judicial appointments. To question a judge's appointment in an appeal against his judgment is, of course, such a collateral attack.

[23] This rule of public policy is encapsulated in s 41(a) of the Interpretation Act 1967 which provides that the proceedings of a board, commission, committee or similar body established by law shall not be invalidated by any defect afterwards discovered in the appointment or qualification of a person purporting to be a member. The legal position is therefore clear. Even though the appointment of the respondent is invalid the awards handed down by him were done so in his capacity as a Chairman of the Industrial Court and are not a nullity on grounds of public policy. They remain valid. It is absolutely necessary for us to make this clarification in order to prevent a High Court from declaring a judgment of the Court of Appeal or the Federal Court based on an award of the respondent as illegal and thereby being of no binding effect in total disregard and blissful ignorance of the doctrine of stare decisis. Such a pronouncement on an order made by the Court of Appeal or the Federal Court may be varied, if the need arises, only at the appropriate appellate level. It must be stressed that where the order was made by the Federal Court it may be varied only by the Federal Court itself and not even by the Court of Appeal. Any deviation from this salutary and well-entrenched rule will give rise to judicial chaos and anarchy thereby endangering and undermining the constitutional and democratic framework of our cherished society.

[24] In the upshot, the appeal is allowed with costs.

Appeal allowed.

Reported by Sally Kee